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No. 01-706

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, INDIANA, MARYLAND, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OREGON, UTAH, WASHINGTON, WEST VIRGINIA

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On Petition for a Writ of Certiorari to the
Supreme Court of Illinois

BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, INDIANA, MARYLAND, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OREGON, UTAH, WASHINGTON, WEST VIRGINIA

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the undersigned Attorneys General of the States of Missouri, Arkansas, California, Connecticut, Florida, Hawaii, Indiana, Maryland, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oregon, Utah, Washington, and West Virginia submit this brief in support of Petitioners Rex Sprietsma, *et al. Amici* have a strong interest in preserving the appropriate balance of authority between the States and the federal government. They regularly defend not just statutory but also common law rights of states, state officials, and state subdivisions – rights that are threatened by the rule adopted by the court below. Attorneys general use powers granted both by statute and by the common law to protect the public health, safety, and welfare of the citizens of their states. The use of those powers is threatened because the court below improperly refused to apply a long-standing presumption against preemption of state law that has long been grounded in deference to state sovereignty in policing health and safety. *Amici* ask this Court to correct that error and restore this critical safeguard of federalism by both reversing and by explaining that a federal statute shall not nullify state law claims in the absence of a clear Congressional mandate to preempt those claims.

Amici also believe the lower court's decision here improperly preempted a state law claim on the basis of regulatory *inaction*, despite an express indication from Congress that compliance with the applicable statute would not insulate tortfeasors from common law liability. Although *amici's* primary focus in this brief is based on our concern that

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[1]Some portions of this brief were originally drafted by Steve Baughman Jensen, Esq. of Dallas, Texas. Mr. Jensen is not a counsel for any party.

the court below abandoned the general presumption against preemption, we also share the specific concern that Petitioner's claims here should not have been preempted in the complete absence of any federal regulation governing propeller guards. Thus, *amici* also express their support for the position taken by Petitioner regarding the specific preemption question before the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether federal law will preempt state common law claims that a recreational motor boat engine was defectively designed when it is clear that: (1) the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993), expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); and (2) the U.S. Coast Guard has never adopted any standard or regulation with respect to the subject matter of the underlying lawsuit, propeller guards.

The *amici* state attorneys general urge this Court to affirm its historical deference to the interest of states in exercising their police power to protect the health and safety of state citizens through provision of tort remedies. The court below turned federalism on its head by refusing to apply the long-standing presumption *against* federal statutory preemption of state law remedies. Rather than recognizing that the states, and *not* the federal government, have historically exercised authority in the areas of non-commercial boat safety design, the court below declined to defer to the states' interests in preserving their common law on the basis that this lawsuit involves "an area where there has been a history of significant federal presence." App. ___ (quoting *U. S. v. Locke*, 529 U.S.

89, 108 (2000)). This deference both misapplied *Locke*, and, more importantly, reflected a fundamental misunderstanding of the respective historical regulatory roles of the federal government and the states, particularly in the area of boat safety.

Quite unlike the *Locke* decision, this case involves purported preemption of state common law remedies by a federal statute aimed at regulating certain elements of non-commercial boat safety. In sharp contrast, *Locke* involved preemption of state administrative regulations of commercial ship navigation by federal administrative regulations which governed that very activity. *Sprietsma* thus differs from *Locke* in at least two significant ways: 1) it involves preemption of remedial common law tort claims, rather than conflicting administrative regulations; and 2) it involves a federal statute in the area of pleasure craft safety, rather than a statute governing commercial navigation. Both of these distinctions demonstrate that the lower court erred by relying on *Locke*.

Furthermore, Mr. Sprietsma's lawsuit does not implicate the federal government's historical role in regulating maritime law. Until 1971, the federal government had only a narrowly circumscribed role in regulating non-commercial watercraft. Nor could it be said that federal admiralty jurisdiction itself creates a historical federal interest in this setting. This case has not been litigated in admiralty, and it is unlikely that admiralty jurisdiction exists under these circumstances. Moreover, even if this case were subject to admiralty jurisdiction, under this Court's decision in *Yamaha Motors Corp. v. Calhoun*, 516 U.S. 199 (1996), a state's interest in having its own remedies applied in this context would outweigh any countervailing federal interest in uniformity. When, as here, a boat accident involves a non-seaman, implicates no rules of navigational safety, and is wholly unrelated to commercial maritime activity, it is the states, and *not* the federal government, which have both the

greater current and historical interest in applying their own law and dictating a proper remedy. Thus, this case does *not* involve "an area where there has been a history of significant federal presence," and this Court should give full force to its general presumption against preemption of state common law claims.

ARGUMENT

1. The presumption against federal statutory preemption of state common law claims plays a critical federalism role in protecting the police powers of the States.

The long-standing presumption against statutory preemption of state common law tort claims serves a primary function of federalism by ensuring that federal authority does not insidiously intrude upon the States' historical role in policing health and safety unless Congress clearly and specifically intended such a result.

This Court has repeatedly said that preemption of state efforts to protect health and safety "should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (internal quotation omitted). Local laws relating to health and safety are "those 'the Court has been most reluctant to invalidate.'" *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (citation omitted).

One of the vital "procedural safeguards inherent in the structure of the federal system," *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 552 (1985), is the requirement of a crystal-clear statement of Congressional intent before the States are stripped of the right both to govern themselves and to ensure their residents' redress for injuries caused by unsafe products.

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988). *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 871 n.12 (1995) (Thomas, J., dissenting) (quoting the same sentence of AMERICAN CONSTITUTIONAL LAW and describing *Gregory* as "applying this argument"); and Judge Kenneth Starr & Judge Patrick E. Higginbotham, *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference* 50-51 (1991) (The requirement of a "clear legislative intent to preempt" is also "consistent with the Court's reliance on clear statement rules in other areas of the law.").

Even outside the health and safety context, this Court has declined to affirm preemption unless it finds "an unambiguous congressional mandate" to preempt state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963). Ambiguity is not tolerated; "pre-emption will not lie unless it is the 'clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New*

York State Labor Relations Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting).

By failing to apply the presumption against preemption and by giving preemptive force to a federal statute in the absence of a clear Congressional directive to do so, the court below undermined the importance of the "federalist structure of joint sovereigns" and upset the "proper balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. at 459. This Court should restore that balance by reversing and underscoring the importance of the presumption against preemption in this context.

2. The court below improperly relied upon *U. S. v. Locke* in refusing to apply a presumption against preemption.

The lower court's refusal to apply the long-standing presumption against federal statutory preemption of state common law tort claims in this case was premised on the lower court's improper application of this Court's decision in *U. S. v. Locke*, 529 U.S. 89 (2000). *See* Cert. App. 5-6. Unlike the commercial navigational rules at issue in *Locke*, design of recreational boats has not historically been an area of federal concern. Moreover, in contrast to the administrative law regulations, such as those promulgated by the State of Washington (and determined to be preempted by the Ports and Waterways Safety Act) in *Locke*, state common law claims serve a unique non-regulatory, compensatory purpose.

In *Locke*, this Court invalidated a set of administrative law regulations issued by the State of Washington, governing commercial vessels navigating through a state which "is the site of major installations for the Nation's oil industry and the destination or shipping point for huge volumes of oil and its end products." 529 U.S. at 95, 97. Washington ports are a

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destination for both U.S. oil tankers and foreign flag tankers from places such as Venezuela and Indonesia. *Id.* at 96. The state regulations at issue in *Locke* purported to govern the "design, equipment, reporting, and operating requirements" of oil tankers traveling to and from Washington ports. *Id.* at 97. This Court held that the Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221, *et seq.* preempted those Washington requirements. In reaching this result, this Court noted that because the state law regulations at issue there dealt with matters of "national and international maritime commerce," an area in which there has unquestionably been a "history of significant federal presence," the Court would not apply the ordinary presumption against preemption of state law. *Id.* at 108. Such a presumption should not apply in that context because "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.*

Other than the fact that this case also involves water, it has nothing in common with *Locke* and does not implicate any interest of historical federal concern. The accident that caused Petitioners' decedent's death occurred on Dale Hollow Lake, which is a recreational lake on the Tennessee-Kentucky border created by the Army Corps of Engineers to supply hydroelectric power to the region. There is no evidence in the record that *any* maritime commerce occurs on the lake, nor is there any evidence that the "commercial marinas" in operation at the lake house anything other than pleasure boats. The injury in this case happened when the decedent fell off a ski boat and was killed by the propeller of the boat in which she had been riding. There was no collision with another vessel, and nothing about the incident implicates navigational safety rules established under federal maritime law. Instead, the focus of this case is on the design of a recreational boat, which is something the federal government did not first attempt to regulate in any substantive

fashion until in 1971, with the passage of the Boat Safety Act.

The relative novelty of federal involvement in recreational boat safety regulations stands in sharp contrast to centuries of tradition of strong federal control of interstate and international maritime commerce, which was directly at issue in *Locke*. Before 1971, the policing of recreational boat design was left almost entirely to the States. Moreover, even if one were to conclude (incorrectly) that there has been "a history of significant federal presence" with respect to *regulation* of recreational boat design, such a history would not support abandonment of the presumption against preemption of *common law claims*, which have little regulatory impact and serve a quite different purpose.

Although awarding damages for injuries after the fact may have a deterrent effect, its principal and unique purpose is the compensation of injured victims. "Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted). The tort system operates on a retrospective basis. Each case requires an examination of the particular facts regarding a particular victim and a particular tortfeasor. Tort law is tied to the goal of compensation. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (for this reason, "*[e]very State* has a body of tort law serving" its "compelling interest" in "ensuring that victims ... are compensated by those who harm them.")(emphasis added).

By contrast, statutes and regulations are typically prospective in nature. They focus not on compensating persons for injuries already sustained, but on preventing socially harmful activities. "Regulation is not designed to provide or account for compensation" to the victims of dangerous products

and their families. Mary Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 172 (1995). Safety standards can only attempt to head off injuries in the future – including injuries for which common law torts provide remedies.

The difference between the tort and regulatory systems means that a Congressional decision to prevent States from adopting conflicting administrative and statutory law enactments – such as those at issue in *Locke* – is entirely different from a decision to curtail the compensatory function of tort law. A State should be able to provide a judicial system that resolves claims for wrongful injuries to its citizens and to decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries it could have prevented. To hold otherwise would collapse the tort system's secondary purpose, deterrence, into its primary purpose, relieving the financial burden on those who are injured by the negligent acts of others.

This Court has recognized the distinction between goals of regulation and the tort system as being an important additional basis for applying the presumption against preemption in the context of common law tort claims. This is true both because tort claims have minimal regulatory impact and because regulatory schemes fail to compensate tort victims. *E.g.*, *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954) (where Congress "neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct," this Court refused "to cut off the injured respondent from this right to recovery," observing that to do so would "deprive it of its property without recourse or compensation" and "in effect, grant petitioners immunity from liability for their tortious conduct."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (where there was "no indication that Congress even seriously considered precluding

the use of [tort] remedies," this Court declined "to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). In *Medtronic v. Lohr*, 518 U.S. 470, 486 (1996), a plurality observed that an argument that "Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device" would be "implausible."[2]

In sum, the basis for this Court's decision not to apply a presumption against preemption in *Locke* rested on two factors that are entirely absent here: 1) the existence of an unquestionably significant, centuries-long historical federal role in the area being regulated; and 2) the application of a state administrative regulation, rather than a common law damages claim. This Court should correct the lower court's misinterpretation of *Locke* and clarify that the presumption against preemption has full application in cases such as this one.

3. The relationship between this case and admiralty law is marginal, and in no way supports abandonment of the presumption against preemption.

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[2] *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 175 (1989) ("For a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with governmental statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citations omitted).

Besides relying upon *Locke*, the court below also inappropriately invoked federal maritime law to support its decision to discard the important requirement that Congress must express a clear intent to trump state law before courts may give preemptive effect to a federal statute. *See* Cert. App. 5 ("[T]he claim also encompasses maritime activity, which is traditionally within the realm of federal regulation.") (citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917) ("Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country")). However, this broad brush analysis is inappropriate, as any relationship of this case to admiralty jurisdiction and federal maritime law is marginal at best. This case involves an injury to a non-seaman, who alleges injury caused by the design of a recreational boat, in an accident that in no way implicates rules of navigational activity, on waters that support little or no maritime commerce. Surely, the flimsy relationship between these facts and traditional maritime activity should provide no basis for abandoning the critical federalism protections embodied within the presumption against preemption.

Traditional state interests in the exercise of the police power and compensation of injured victims are directly implicated in this case, while none of the traditional federal concerns in providing uniform regulation of commercial maritime activity apply. In the first instance, the very location of the accident in this case underscores that the case has little or nothing to do with maritime law or admiralty. The accident occurred on an inland lake, and the record does not reflect that *any* commercial maritime activity occurs in those waters. Dale Hollow Lake technically constitutes "navigable waters" of the United States only because it encompasses an interstate border. However, there is no proof in the record that any traditional maritime activity (*i.e.*, maritime commerce) takes place on that lake, nor is there proof that any events that *do* occur on the lake, including the accident at issue in this case, could have any

potentially disruptive impact on maritime commerce. Thus, i is at the very least highly questionable whether admiralty jurisdiction could have been invoked in this case. *See, e.g.*, *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (noting that the test for admiralty jurisdiction requires that: 1) the tort occurred on navigable water; 2) the incident must have a "potentially disruptive impact on maritime commerce"; and 3) the general character of the activity giving rise to the incident must have a "substantial relationship to traditional maritime activity").[3]

But even if this case could have been heard in admiralty as a *jurisdictional* matter, from a *choice of law* perspective it is clear that the state of Illinois' interests in providing a tort remedy to the Sprietsmas outweigh any federal interest in the application of maritime law. In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), this Court chose to apply state wrongful death law to a case involving a non-seaman's death arising from use of a recreational watercraft, despite the fact

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[3] This case is distinguishable from *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982) in which this Court determined that admiralty jurisdiction existed in a case involving a collision between two recreational watercraft. In *Foremost*, this Court emphasized that "admiralty law has traditionally been concerned with the conduct alleged to have caused this collision by virtue of its 'navigational rules--rules that govern the manner and direction those vessels may rightly move upon the waters.'" 457 U.S. at 675 (quoting *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 270 (1972)). Admiralty law's concern with navigational rules anchored the result in *Foremost*, because that case involved a collision between two watercraft. Here, by contrast, the decedent's injury involved only a single boat, and admiralty's rules of navigation cannot be implicated.

that the case was governed by admiralty jurisdiction. There, this Court stressed that "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters." 516 U.S. at 215 n.13 (internal citations omitted). Moreover, longstanding tradition among admiralty courts provides that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *Id.* at 213 (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970)).

Most importantly, this Court recognized in *Yamaha* that "uniformity concerns" that had pervaded prior decisions to apply federal law in the maritime context simply were of much less significance in the context of a claim involving a "nonseafarer" – that is, someone covered by neither the Jones Act, 46 U.S.C. § 688, nor the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* – in state territorial waters. Because Congress had not enacted any comprehensive statutory tort recovery scheme to address such claims, this Court held that it was appropriate to apply a state law remedy in those circumstances. 516 U.S. at 215-16. In other words, in the absence of a comprehensive federal remedial scheme, this Court has held and should continue to hold that, even in an admiralty case, a state's interests in providing a compensatory remedy outweigh any federal interest in uniformity, especially when "uniformity" would result in the utter lack of a remedy.

Just as in *Yamaha*, Mr. Sprietsma's claims here involve an injury to a nonseafarer in state territorial waters. As stated above, neither the Boat Safety Act, the Jones Act, nor any other federal statutory scheme provide any remedy for these claims. Under *Yamaha*, it is clear that in these circumstances the federalism interests of states in providing a remedy trump any countervailing concerns regarding the uniformity of maritime law. Thus, the lower court's decision in this case to jettison the

presumption against preemption not only ignored this Court's decision in *Yamaha* – it effectively turned the *Yamaha* analysis on its head. This Court should take this opportunity to correct the lower Court's misunderstanding of the relative importance of state and federal interests by restoring the presumption against preemption.

Finally, *amici* note that the lower court's over-reliance on the traditional role of the federal government in regulating admiralty law here is even more troubling in light of recent admiralty scholarship that has called into serious question the constitutional foundation for federal preemption in the context of admiralty law. *See, e.g.*, Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L.R. 273 (1999)(hereinafter "*Preemption at Sea*") and Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS L.J. 1349 (1999)

Moreover, even scholars who have generally defended the necessity for federal uniformity in the maritime context have criticized any notion that federal law should be applied in contexts similar to those at bar. *See* Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. MAR. L. & COM. 517, 541 (2001) ("If we continue to extend substantive maritime law to situations in which no national interest is clearly implicated, and if we continue to displace state law in situations where, by contrast, there is a clearly discernible state interest, we risk the undoing of the general maritime law as we know it, and as we need it"). Thus:

> there should be a presumption in favor of state governance. Although the familiar presumption against preemption operates primarily to ensure that Congress – in which the states are

> represented – retains responsibility for preemption decisions, it also reflects a more basic judgment that state regulatory authority should be disturbed only in exceptional circumstances. This is in keeping with Madison's insight that the ultimate survival of the federal system turns on the ability of state governments to retain the loyalty of the people by using state regulatory powers to supply their most basic needs and wants. State law should yield, therefore, only to a strong countervailing federal maritime policy.

Preemption at Sea, 67 Geo. Wash. L.R. at 357.

In short, the invocation by the court below of the federal role in regulating maritime law was particularly misplaced in the factual context of this case, especially in light of this Court's recent jurisprudence and the scholarship calling for a complete rethinking of the role of federalism in the admiralty setting.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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